

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Terrell N. Heydrick, Individually and
Behalf All Others Similarly Situated,

Plaintiff,

v.

J.L Hawes Inc., DBA Bear E Patch Cafe-
West, John Hawes, and Susan Hawes,
individually

Defendants.

CIVIL ACTION NO: 2:16-cv-2413-CWH

COLLECTIVE ACTION COMPLAINT
(Jury Trial Requested)

Plaintiff Terrell N. Heydrick, individually and on behalf of all others similarly situated, by way of the Complaint in the above-captioned matter, alleges the following claims against Defendants, J.L Hawes Inc. DBA Bear E. Patch Cafe-West, John Hawes, and Susan Hawes, individually pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, (“FLSA”), and the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, *et seq.* (“SCPWA”).

NATURE OF CLAIM

1. This is an action for violations of the minimum wage and unpaid overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* (FLSA). Plaintiff is a former server of Defendants. Defendants engaged in a practice of wage theft whereby they illegally claimed a tip credit to reduce the hourly wages below the Federal Minimum Wage of \$7.25 and by failing to pay time and half when employees worked over 40 hours in a workweek.

2. Plaintiff bring this action as a collective action pursuant to 29 U.S.C. §216(b), individually and on behalf of other similarly situated employees of the Defendants who worked as servers and who suffered damages as a result of Defendants' violations of the FLSA.

3. Plaintiff also bring individual and class claims for unpaid wages under the South Carolina Payment of Wages Act, S.C. Code Ann § 41-10-10, *et seq.* (SCPWA).

PARTIES, JURISDICTION AND VENUE

4. Plaintiff Terrell N. Heydrick is a citizen and a resident of Charleston County, South Carolina.

5. Defendant, J.L Hawes Inc, is a for-profit limited liability corporation, organized and existing under the laws of South Carolina, and is registered with the South Carolina Secretary of State.

6. Defendant, John Hawes, is a citizen and resident of Charleston County.

7. Defendant, Susan Hawes, is a citizen and resident of Charleston County.

8. Venue is proper in this District because the Defendants have conducted substantial, continuous and systematic commercial activities in Charleston County. Additionally, the unlawful labor practices and policies giving rise to Plaintiff's claims were committed in the Charleston Division of this Court.

9. Plaintiff brings this action, individually and as an opt-in collective action pursuant to 29 U.S.C. § 216(b), on behalf of a class of all similarly situated servers who worked in excess of forty (40) hours during certain workweeks without receiving overtime compensation, and who were not paid the federal minimum wage, and had improper deductions from their wages and tips while working for Defendants at Bear E. Patch Cafe-West restaurant.

10. This Court has jurisdiction of the Plaintiff's claims brought under the FLSA pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216 (b).

11. Upon information and belief, this action satisfies the requirements of Rule 23(a), Fed. R. Civ. P., as alleged in the following particulars:

- a. The proposed Plaintiff's class is so numerous that joinder of all individual members in this action is impracticable;
- b. There are questions of law and/or fact common to the members of the proposed Plaintiff's class;
- c. The claims of Plaintiff, the representative of the proposed Plaintiff's class, are typical of the claims of the proposed Plaintiff class; and
- d. Plaintiff, the representative of the proposed Plaintiffs class, will fairly and adequately protects the interests of the class.

12. In addition, upon information and belief, this action satisfies one or more of the requirements of Rule 23(b), Fed. R. Civ. P., because the questions of law and/or fact common to the members of the proposed Plaintiff's class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

13. In addition, this Court has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367 over Plaintiffs' pendent claims, which are brought pursuant to the law of the State of South Carolina, because those claims arise out of the same transaction or occurrence as the federal claims alleged herein.

FACTS

14. Defendant, J.L Hawes Inc, is a South Carolina limited liability company, which operates Bear E. Patch Cafe-West, a restaurant located at 1980 Ashley River Rd, Charleston, SC 29407.

15. Defendant John Hawes is an owner and manager of Bear E. Patch Cafe-West. Defendant John Hawes acts directly and/or indirectly in the interest of Defendants in relation to Plaintiff and similarly situated employees. Defendant John Hawes managed, owned and operated, Bear E. Patch Cafe-West and J.L Hawes Inc. He regularly exercised the authority to hire and fire employees, determine the work schedules of employees, set the rate of pay of employees, and control the finances and operations of such business. By virtue of such control and authority Defendant Hawes was an employer of Plaintiff as such term is defined by the Act. 29 U.S.C. §201 et seq.

16. Defendant Susan Hawes is an owner and manager of Bear E. Patch Cafe-West. Defendant Susan Hawes acts directly and/or indirectly in the interest of Defendants in relation to Plaintiff and similarly situated employees. Defendant Susan Hawes managed, owned and operated, Bear E Patch Cafe-West and J.L Hawes Inc. She regularly exercised the authority to hire and fire employees, determine the work schedules of employees, set the rate of pay of employees, and control the finances and operations of such business. By virtue of such control and authority Defendant Susan Hawes was an employer of Plaintiff as such term is defined by the Act. 29 U.S.C. §201 et seq.

17. The Defendants employed Terrell N. Heydrick from May of 2013 to March of 2016.

18. Plaintiff and other similarly situated employees had an employment agreement whereby Defendants paid Plaintiff an hourly rate for all hours worked plus tips.

19. Plaintiff was paid \$5.00 an hour plus tips.

20. Plaintiff and other similarly situated employees worked for the Defendants as servers. Their primary job duties as a server included taking customers' food and beverage orders.

21. Defendants paid Plaintiff, and other similarly situated servers, less than the statutory minimum wage by taking the "tip credit" under the FLSA, 29 U.S.C. § 203(m).

22. In order to meet the FLSA minimum wage of \$7.25 for Plaintiff when she worked as a server, and for other similarly situated servers, the Defendants applied a "tip credit" based on the tips received by the servers for their service to customers.

23. Defendants violated the tip credit notice requirement of 29 U.S.C. § 203(m), because they did not inform the employees that they intend to treat tips as satisfying part of their minimum wage obligation. Defendants did not notify Plaintiff or similarly situated employees of their policy regarding the FLSA's tip credit provisions.

24. Defendants failed to notify Plaintiff, as well as other similarly situated employees, regarding the provisions of their tip policy.

25. Defendants failed to inform the Plaintiff, as well as other similarly situated employees regarding the amount of the tip credit that it was taking.

26. Defendants failed to inform Plaintiff as well as other similarly situated employees regarding the amount of tip pool contributions they would be required to make either before or after they were hired.

27. Defendants required Plaintiff and similarly situated servers to participate in a mandatory “tip pool” which included the owners, general manager, managers, cooks and dishwashers.

28. At the end of each shift, the servers pooled their tips together and tipped the dishwashers, cooks and cashier. The owners and/or general manager and managers required the servers to pay them \$60.00 or more from the tip pool, when they worked as a cashier or assisted the cashier at any time during the shift. After tipping out the dishwashers, owners, general manager, managers and cooks the servers split the remaining tips between themselves.

29. The dishwashers and cooks who worked at Defendants’ restaurant were part of the kitchen staff. They worked primarily in the kitchen or “back of the house”; they did not interact with the restaurant’s customers; and they did not render a direct service to any customer of the Defendants.

30. The cooks received all the tips from the take-out orders. The servers took the orders from the customers, placed the orders with the kitchen and packaged the orders for pick-up, however; the servers did not receive any tips from the take-out orders because it was the Defendants policy and practice that the cooks received all of these tips.

31. By law, the dishwashers and cooks who were employed by the Defendants are not considered “tipped employees” under the FLSA; therefore, they are forbidden from receiving tips directly from other tipped employees or pursuant to a tip pool. 29 U.S.C. § 203(m).

32. Defendant John Hawes, is a owner of Bear E. Patch Café-West and is not, by definition, a "tipped employee" eligible to share in a tip pool under § 203(m).

33. Defendant Susan Hawes, is an owner of Bear E Patch Café-West and is not, by definition, a "tipped employee" eligible to share in a tip pool under § 203(m).

34. The general manager and managers primary duties included hiring, firing, creating the schedule, supervising and disciplining employees therefore the general manager and managers of Bear E Patch Café-West are not, by definition, "tipped employees" eligible to share in a tip pool under § 203(m).

35. The general manager, managers, owners, dishwashers and cooks were unlawfully included in the tip pool.

36. Defendants were not entitled to reduce the minimum wage by applying the tip credit allowance that is available under 29 U.S.C § 203 (m) because Defendants retained portions of Plaintiff's and similarly situated employees tips for their own purposes.

37. Plaintiff complained to the Defendants about their policy of requiring her and other servers to tip the owners, general manager, managers, cooks and dishwashers.

38. A tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit. The FLSA prohibits any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer.

<https://www.dol.gov/whd/regs/compliance/whdfs15.htm>

39. Defendants had a willful policy of taking a portion of their servers tips directly from them each shift and using them for their own purposes.

40. Defendants actions were not in good faith or based upon a reasonable belief that they were not violating applicable laws.

41. As a result of the Defendants' mandatory tip pool, the Defendants violated the rights of the Plaintiff and similarly situated employees by failing to pay these employees the federally mandated minimum wage of \$7.25 an hour.

42. In addition to maintaining a policy that invalidates the Defendants' tip credit scheme, Defendants also miscalculated the overtime rate for all servers who worked in excess of forty (40) hours per week.

43. By law, when tipped employees paid pursuant to a tip credit scheme work overtime, the employer is to calculate the employees overtime rate at one and half (1.5) times minimum wage not the lower direct wage payment of the tip credit scheme. 29 U.S.C § 203 (m).

44. Defendants violated the aforementioned law by not calculating Plaintiff's overtime rate based upon one and half times (1.5) of the minimum wage.

45. At all times relevant to this complaint, Plaintiff and other similarly situated employees were non-exempt employees for purposes of the overtime compensation provisions of the FLSA.

46. During their employment with Defendants, Plaintiff and other similarly situated employees typically worked approximately four (4) to five (5) hours a week of overtime that they were not properly compensated for.

47. Defendants made illegal deductions from Plaintiff's and similarly situated employees wages and tips when dishware was broken, when food was incorrectly ordered and when the cashier did not properly charge a customer due improperly reading the servers ticket.

48. Defendants also made illegal deductions of fifty dollars (\$50.00) from Plaintiff's and similarly situated employees, wages and tips if they did not properly close out the credit card machine at the end of a shift.

49. State or federal law did not permit these deductions from Plaintiff's and similarly situated servers wages.

FOR A FIRST CAUSE OF ACTION
(Fair Labor Standards Act–Failure to Pay Overtime Wages)
(Individual and Collective Action)

50. Plaintiff, on behalf of herself and all similarly situated employees, realleges and incorporates by reference all preceding paragraphs as if they were set forth herein verbatim.

51. At all times pertinent to this Complaint, each Defendants were an “enterprise engaged in commerce or in the production of goods for commerce” as that term is defined by 29 U.S.C. § 203(s).

52. At all times relevant herein, each Defendants were an “employer” of Plaintiff and similarly situated employees as that term is defined by 29 U.S.C. § 203(d) of the Fair Labor Standards Act.

53. Plaintiff and other similarly situated employees worked in interstate commerce so as to fall within the protections of the FLSA.

54. At all times relevant herein, the annual gross sales volume of the Defendants’ business was in excess of \$500,000.

55. Defendants employed Plaintiff and similarly situated employees who worked as servers for workweeks longer than forty (40) hours without compensating Plaintiff and similarly situated employees at a rate of one-and-a-half times their regular rate of pay as required by 29 U.S.C. § 207(a).

56. Defendants’ violations of the FLSA were willful and reckless.

57. Plaintiff and similarly situated employees are entitled to back pay of unpaid overtime compensation at the rate of one-and-a-half times their regular rate of pay for all hours worked in excess of forty (40) hours in a workweek, liquidated damages in an equal amount, and

their reasonable attorneys' fees and costs incurred in bringing this action pursuant to 29 U.S.C. § 216(b).

FOR A SECOND CAUSE OF ACTION
(Fair Labor Standards Act-Minimum Wage Claim)
(Individual and Collective Claim)

58. Plaintiff, on behalf of herself and all other similarly situated employees, reallege and incorporates by reference all preceding paragraphs as if specifically set forth herein.

59. The FLSA mandates that Defendants compensate non-exempt employees at minimum wage rate of \$7.25 per hour.

60. The FLSA, 29 U.S.C. § 203(m), provides an exception allowing Defendants to pay less than the statutory minimum wage to tipped employees, on the condition that the pooling of tips amongst those who customarily and regularly receive tips.

61. When the Defendants shared in the tip pool, the tip pool was invalidated.

62. Without the benefit of the tip credit provision, the Defendants must pay the Plaintiff and similarly situated employees the statutory minimum wage of seven and 25/100 (\$7.25) per hour.

63. Defendants' compensation of the Plaintiff and other similarly situated employees violated the minimum wage provisions of the FLSA because Defendants did not permit Plaintiff and other similarly situated employees to retain all the tips they received.

64. Defendants' compensation of the Plaintiff and other similarly situated employees violated the minimum wage provisions of the FLSA because Defendants unlawfully retained portions of the tips received by Plaintiffs and other similarly situated employees for Defendants' own profit.

65. Defendants' compensation of the Plaintiff and other similarly situated employees violated the minimum wage provisions of the FLSA because Defendants distributed the tip pool to employees who did not customarily and regularly receive tips.

FOR A THIRD CAUSE OF ACTION
(South Carolina Payment of Wages Act)
(Individual and Class Action)

66. Plaintiff, on behalf of herself and all similarly situated employees, reallege and incorporate by reference all preceding paragraphs as if they were set forth herein verbatim.

67. Plaintiff and similarly situated employees worked for Defendants with the clear understanding and agreement by Defendant that their compensation would be consistent with all applicable laws, including federal and state wage and hour laws.

68. Plaintiff and similarly situated employees had an employment agreement with Defendants whereby they would be paid for all hours worked plus tips.

69. Each Defendant is an "employer" as defined by the S.C. Code Ann § 41-10-10(1).

70. S.C. Code Ann § 41-10-10(2) defines wages as "all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract".

71. Defendants owe Plaintiff and the members of the Plaintiff's class "wages" as defined in S.C Code Ann. § 41-10-10 (2) of the SCPWA, to compensate them for labor rendered to Defendants, as promised to Plaintiffs and similarly situated employees and as required by law.

72. Pursuant to the SCPWA, “[a]n employer shall not withhold or divert any portion of the employee’s wages unless the employer is required or permitted to do so by state or federal law. . . .” S.C. Code Ann. § 41-10-40(C).

73. Further, “any changes [to] the terms [of wages] must be made in writing at least seven calendar days before they become effective.” S.C. Code Ann. § 41-10-30(A).

Defendants have failed to pay Plaintiffs and similarly situated servers all wages due, as required by SCPWA.

74. Defendants also failed to pay Plaintiff and the members of the Plaintiff’s class similarly situated servers according to their employment agreement.

75. Accordingly, Plaintiff as well as similarly situated employees are entitled to receive all compensation due and owing to them including recovery of their tips that Defendants unlawfully took from them in excess of the minimum wage.

76. Pursuant to S.C. Code § 41-10-80(C), Plaintiff and the members of the Plaintiff’s class are entitled to recover in this action an amount equal to three times the full amount of their unpaid wages, or their wrongfully deducted wages, plus costs and reasonable attorney’s fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and all other similarly situated employees, seeks judgment against the Defendants as follows:

- a. That this Court certify this action as a collective action pursuant to 29 U.S.C. § 216 (b);
- b. Judgment against Defendants for an amount equal to Plaintiff’s and similarly situated employees’ wages at the applicable hourly rate of \$7.25;
- c. Judgment against Defendants for the amount of unlawfully retained portions of the tips they received from Plaintiffs;

- d. An award of compensatory damages in an amount equal to the unpaid overtime compensation and minimum wages owed to Plaintiff and similarly situated employees pursuant to 29 U.S.C. § 216(b);
- e. An award of liquidated damages in an amount equal to the award of compensatory damages pursuant to 29 U.S.C. § 216(b);
- f. An award of treble damages pursuant to the South Carolina Payment of Wages Act;
- g. Judgment against Defendants that their violation of the FLSA and its implementing regulations were willful;
- h. An award of the reasonable attorneys' fees and costs incurred by Plaintiff's and similarly situated employees in bringing this action; and
- i. All such further relief as the Court deems just and equitable.

JURY DEMANDED

Plaintiff Heydrick, individually and on behalf of herself and all other similarly situated employees hereby demand a trial by jury.

Respectfully submitted,

s/ Marybeth Mullaney
Marybeth Mullaney (Fed. ID No. 11162)
Mullaney Law
1037-D Chuck Dawley Suite 104
Mount Pleasant, South Carolina 29464
Phone & Fax (800) 385-8160
marybeth@mullaneylaw.net
Attorney for Plaintiff

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Mount Pleasant, South Carolina.